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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 885

JOSEPH DANIEL HOLT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1968

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JOSEPH DANIEL HOLT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Joseph Daniel Holt, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on September 16, 1968.

OPINIONS BELOW

Pursuant to jury verdict finding petitioner guilty as charged herein, judgment and sentence (Appendix A, pp. i-ii) was entered by the United States District Court for the Western District of Oklahoma on December 1, 1967. The opinion of the Court of Appeals (Appendix B, pp. iii-xii) was thereafter filed September 16, 1968, and is reported at ..... F.2d .....

JURISDICTION

A petition for rehearing was thereafter denied on November 20, 1968 (Appendix C, p. xiii). The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C.A., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrantless search of petitioner's person by Secret Service Agents was unreasonable and in violation of petitioner's constitutional rights, where the arrest and search was conducted by agents upon receipt of a "tip" from an informant whose previously established reliability is not clearly shown, and where such "tip" is not shown to have been first corroborated by independent facts within the personal knowledge of such arresting agent.

2. Whether an admittedly inaudible tape recording obtained by agents through use of an electronic eavesdropping device attached by them to the body of their informant prior to his meeting with petitioner, constituted an unreasonable search and seizure in violation of petitioner's constitutional rights where, although the rendezvous of such informant with petitioner had been planned and the location thereof designated by such agents for more than one week, no judicial determination was sought or obtained by the agents as to the existence or non-existence of probable cause, nor judicial authority granted for such search, prior to the installation of the listening device upon the informant's person.

3. Whether the respondent-Government was estopped to introduce into evidence on rebuttal a certain palm-

fingerprint, such evidence having been obtained from the trial record of a previous criminal case which, based upon the incompetency and inconclusiveness of the same palm-fingerprint to connect petitioner to the crime there charged, resulted in a directed verdict of acquittal as to petitioner; and, whether the admission of such palm-fingerprint evidence in the case at bar operated to deny to petitioner substantial constitutional rights.

STATEMENT

A. THE BASIC FACTS: The operative record facts are substantially as follows:

In March, 1967, Agent Charles Kunkel of the United States Secret Service arrested one Harry Tripp at Dallas, Texas for possession of counterfeit money. Soon thereafter, at the specific request of Secret Service Agents and in order to prevent personal prosecution, Tripp initiated a series of contacts with petitioner-Holt regarding the purchase of "fifteen cars," a term asserted by Tripp as having reference to his purchase of $15,000 in counterfeit currency (R. 165-182). While testimony of agent-witnesses reflect their planned surveillance of petitioner in anticipation of his meeting with Tripp at the Will Rogers World Airport in Oklahoma City, Oklahoma for a period of one week to ten days prior to the date of rendezvous, *i.e.*, June 14, 1967 (R. 5, 122-123, 134), it cannot be doubted on this record that this skillfully formulated maneuver was put into motion by Tripp, acting at the direction of Agents of the United States Secret Service at least "two days before that" (R. 173, 156-165).

Agent Edward E. Moore testified in substance that while he had been advised as to the nature of his assign-

ment for approximately one week prior to being dispatched from Washington, D. C. to Dallas, Texas, it was there that he was first introduced to Tripp on June 13, 1967. The following morning, Tripp again met with Agent Moore and an Agent Leiter in a Dallas motel room, where a miniature transmitter was taped to his person by Agent Moore, who then accompanied Tripp on an airplane flight from Dallas to Oklahoma City, to assist in the investigation and apprehension of petitioner-Holt (R. 156-185). Meanwhile, Patrick H. Steele, Special Agent in charge of the Secret Service at Oklahoma City, Oklahoma, who testified he had knowledge of Tripp's scheduled meeting with petitioner for approximately one week prior to June 14, 1967 (R. 5, 134), carefully planned his surveillance of petitioner's activities, calling together agents from throughout the organization, several coming from locations outside the State of Oklahoma (R. 91, 97, 116-117). These agents, having been briefed the day before, convened with Agent Steele at the airport early on the appointed morning, and upon the arrival and deboarding of Tripp, followed by Agent Moore, each agent was stationed at a strategic location within the terminal building.

Tripp deplaned and went into the airport coffee shop, where he was observed in conversation with petitioner (R. 200-202). The two men then separated, leaving the coffee shop, and Agent McWethy, who was located near the front door of the terminal building, testified he next observed petitioner in the main lobby (R. 123-126). At this moment, Tripp purportedly directed Agent McWethy's attention to petitioner, stating, "He's in the phone booth and he's got it on him" (R. 118, 126). Apparently, this bit of

information was then relayed to Agent Copeland through two other agents, and Agent Copeland thereupon proceeded to arrest petitioner for possession of counterfeit money, conducting a search of his person as an incident thereto. As a result of this search, it is asserted by the respondent-Government that Agent Copeland seized the 150 counterfeit $100 Federal Reserve Notes with which petitioner is herein charged.

B. THE ARREST AND SEARCH ISSUE: Pursuant to an evidentiary hearing, the trial court overruled petitioner's pre-trial motion to suppress articles seized from his person at the time of his arrest by Agent Copeland, which articles form the basis of the instant charge and subsequent conviction (R. 3-18). And, during the trial of this case, Government's Exhibits Nos. 1 and 2 were accordingly admitted into evidence over petitioner's objections. Throughout these proceedings, Agent Copeland candidly admitted that at the moment of the arrest herein, he did not have a warrant to arrest or search petitioner. His testimony eliminates any possible contention that this agent was in "fresh pursuit" or had observed any misdemeanor or felony committed by petitioner in his presence (R. 62-80, 5-42). Indeed, on this record, respondent-Government must rely wholly upon the "tip" received from its witness-informant, Tripp, *i.e.*, "He's in the phone booth and he's got it on him," as the basis for petitioner's arrest and search (R. 118-119).

Agent Copeland testified that he was first advised of the nature of his surveillance assignment at Will Rogers World Airport less than two hours before making the arrest herein (R. 80). Contrary to the facts assumed by the court below, this arresting agent further testified that, at

the critical moment of the instant arrest, he did not know the Government's informant, Harry Tripp, and candidly admitted that he possessed no personal knowledge regarding Tripp's background, the nature of Tripp's information, or his reputation for reliability (R. 94). Moreover, Agent Copeland's testimony specifically and completely negates any possible contention that he could recognize as containing counterfeit currency a "bulge" assertedly observed in petitioner's pocket prior to the arrest (R. 90-94).

There is nothing on this record to indicate (1) that the Government's informant, Tripp, saw counterfeit currency in petitioner's possession on June 14, 1967; or (2) that such informant was trained, experienced or otherwise qualified to recognize such currency as "counterfeit" or contraband when and if he saw it. Tripp did not buy anything from petitioner. Indeed, no one asserts on this record that Tripp ever saw Government's Exhibits Nos. 1 and 2, or had this package of currency in his possession. And, even if Tripp had observed a package prior to petitioner's arrest, until it was unwrapped and opened, even the trained and experienced Secret Service Agents were admittdly unable to discern whether or not its contents were counterfeit (R. 90, 131-133).

C. THE ELECTRONIC EAVESDROPPING ISSUE: Agent Edward Moore, who had taped a miniature radio transmitter to Tripp's body in Dallas, Texas and then accompanied the informant to Oklahoma City on June 14, 1967, testified that after their plane had entered the approach pattern at Will Rogers World Airport, the transmitter was turned on (R. 155-165). Agent Patrick Steele testified that he had supervised the tape recording of a

conversation had by the informant (R. 186-187). However, there is no evidence on this record to the effect that at the instant Agent Steele was eavesdropping, he had his informant under observation and could thus properly identify petitioner as the other party to the taped conversation. Moreover, there is admittedly a break in the chain of custody of this exhibit, a written transcription of the recording was not offered in evidence by the Government, and petitioner's motion for a continuance under 18 U.S.C. § 3500 was summarily overruled by the trial court (R. 187-193).

D. THE PREVIOUSLY ADJUDICATED EVIDENCE ISSUE: Petitioner testified in his own behalf, whereupon the defense rested its case. The respondent-Government then proceeded to introduce in rebuttal Government's Exhibits Nos. 4 through 7, same having been withdrawn from a criminal case pending on appeal before the Fifth Circuit Court of Appeals, wherein the Texas trial court had previously directed a verdict of "not guilty" in favor of petitioner-Holt, based upon the inconclusiveness of the same palm-fingerprint evidence (R. 212-246). Respondent asserted in the court below that such exhibits were tendered on this record to prove intent on the part of petitioner (R. 214-215). But, the fallacy of this assertion rests in the fact that respondent had already rested its case-in-chief (R. 138). And, it is clear that the same exhibits formed the basis of a federal criminal prosecution in the Texas court which resulted in acquittal of petitioner. Counsel for petitioner declared surprise, moved for a mistrial (R. 218), and requested a continuance under 18 U.S.C. § 3500, all of said motions, together with numerous objections, being summarily overruled by the trial court herein (R. 233).

Respondent-Government obtained the evidence complained of from the trial record in Case No. CR 66-H-192, previously tried before the United States District Court for the Southern District of Texas, wherein petitioner, Joseph Daniel Holt, was named co-defendant. The thrust of petitioner's contention here is that the subject palm-fingerprint evidence, *i.e.*, Government's Exhibits Nos. 4 through 7, does not and cannot be inferred to constitute "* * * evidence of passing or attempting to pass similar notes on other occasions * * *," as was concluded by the court below at pages 11 through 12 of its opinion filed herein; that, to the contrary, this same evidence has been specifically adjudicated by a Fifth Circuit Court as being inconclusive and incompetent to connect Joseph Daniel Holt, the petitioner herein, to the passing or possession of any similar counterfeit currency; and, that by reason of such adjudication, a dismissal of the charge as against Joseph Daniel Holt was there ordered. (See: Exhibit "A," attached to the Petition for Rehearing filed on behalf of petitioner in the court below.)

E. THE DECISION OF THE COURT OF APPEALS: Petitioner duly perfected his appeal from the judgment and sentence imposed by the trial court to the United States Court of Appeals for the Tenth Circuit. Thereafter, the Court of Appeals affirmed the United States District Court for the Western District of Oklahoma (C.A. Op., pp. iii-xii). A petition for rehearing was likewise filed with the court below by petitioner, and denied (Appendix C, p. xiii).

REASONS FOR GRANTING CERTIORARI

I. In its written opinion affirming the judgment and sentence of the trial court, the court below properly observed that under Title 18, U.S.C.A., Sec. 3056, the Secret Service is empowered to effectuate a lawful arrest without a warrant only if there is "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, and that "reasonable grounds" as used in that statute and "probable cause" as used in the Fourth Amendment are substantially equivalent (C.A. Op., p. vi). The question then is whether Agent Copeland, equipped with only scant and uncorroborated hearsay information, can be said to have personally possessed, prior to the instant arrest, "reasonable grounds" or "probable cause" constitutionally sufficient to support a warrantless arrest of petitioner and the subsequent search of his person as an incident thereto. We think the decision of the court below, insofar as it deals with the search and seizure herein, runs counter to numerous decisions of this Court and is in consequence in conflict with rulings in other circuits.

The fundamental test for determining the existence of probable cause is the same at all stages of the criminal proceedings, and while hearsay may be the basis for either a warrantless arrest as in *Draper* v. *United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327, or for the issuance of a search warrant as in *Jones* v. *United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, in order to establish the constitutionally requisite reasonable or probable cause (1) the officer's underlying reason for crediting information received from a third party must also be presented, *i.e.*, corroboration through matters within said officer's personal

knowledge; and (2) the totality of facts within the knowledge of said officer or of which he has reasonable trustworthy information must be sufficient to warrant a man of reasonable caution in believing that the offense has been or is being committed. See: *Carroll* v. *United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790; *Brinegar* v. *United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *Henry* v. *United States,* 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Aguilar* v. *State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; *Beck* v. *State of Ohio,* 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142; and *McCray* v. *State of Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62. True, there is no precise formula or equation for determining the existence of probable cause. See: *United States* v. *Ventresca,* 380 U.S. 102, 116-123, 85 S.Ct. 741, 750-753, Justice Douglas dissenting. While the Fourth Amendment denounces only unreasonable searches and seizurues, *Carroll* v. *United States, supra,* its protection must be extended to all persons equally—those justly suspected and accused as well as the innocent; to offenders as well as the law-abiding. See: *Agnello* v. *United States,* 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409; and *United States* v. *Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775. It is equally well settled that the essential elements of probable cause necessarily existent to support a warrantless arrest must be sufficiently strong to support the issuance of a warrant for that arrest, search or seizure, *Worthington* v. *United States,* 166 F.2d 557, and cannot be supplied by what a search conducted incident to the challenged arrest subsequently revealed. See: *Byars* v. *United States,* 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520. Common rumor, report, suspicion or even strong reason to suspect is not

adequate to support a warrant for arrest. See: *Henry* v. *United States, supra; United States* v. *Di Re,* 332 U.S. 531, 68 S.Ct. 222, 92 L.Ed.2d 210; *Johnson* v. *United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436; and *Giordenello* v. *United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503. Moreover, as established in *Siramarco* v. *United States* (10 C.A.), 315 F.2d 699, 702:

> "(T)he legality of a search cannot be balanced against the good faith of the searcher or the extent or correctness of his legal knowledge. An unlawful search, though made in the honest belief of right, remains unlawful and its fruits remain forbidden. * * *"

And see *Green* v. *United States* (10 C.A.), 386 F.2d 953.

On the record evidence in the case at bar, as in *United States* v. *Di Re, supra,* the only fact within the personal knowledge of the arresting agent, prior to arrest, with which to corroborate the so-called "tip" received from the Government's informant, Tripp, was the physical presence of petitioner at the Will Rogers World Airport on a date admittedly appointed by the informant for their meeting.

> "Even when officers had information far more suggestive of guilt than the word of the informer used here, we have not sustained arrests without a warrant. In Johnson v. United States, 333 U.S. 10, 16, 68 S.Ct. 367, 92 L.Ed.2d 436, the arresting officer not only had an informer's tip but he actually smelled opium coming out of a room; and on breaking in found the accused. That arrest was held unlawful. Yet the smell of opium is far more tangible direct evidence than an unverified report that someone is going to commit a crime * * *." Justice Douglas dissenting in *Draper* v. *United States, supra,* 358 U.S. 307, 322, 79 S.Ct. 329, 338.

In *Draper*, the arresting officer investigated an informant's tip, "* * * whose information had always been found accurate and reliable * * *" and observed the accused "* * * having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that (the informant) had described, alight from one of the very trains from the very place stated . . ." *Draper* v. *United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333. The majority opinion held in effect that the officer's personal observations of these rather innoculous facts constituted corroboration of the informer's tip to the effect that the accused would arrive at a particular place, at a particular time, wearing specifically described clothing, and having three ounces of heroin on his person or in his bag, thereby establishing probable cause for the arrest and subsequent search. But, the proven reliability of the informant, together with the corroborative facts within the officer's knowledge in *Draper, ibid.*, present elements of probable cause decisively different from the meager factual showing in the case at bar.

Relying on *Draper, supra*, the court below seemed to conclude in the instant case that although neither the informant nor the reliable character of his information were known to Agent Copeland at the time of petitioner's arrest herein, testimony of other agents elicited by the respondent-Government during trial herein, regarding their dealings with the informant, Tripp, could somehow be imputed to the knowledge of the arresting agent, thus constituting the "tip" received as information from a reliable source, which when coupled with the fact of petitioner's presence at the airport, arose to the dignity of "probable

cause." Here, however, the informant admittedly caused petitioner to be present at the airport on an appointed date and time, and at the specific direction of the Secret Service Agents, who simultaneously had petitioner under surveillance. But, the factual difference becomes clear when it is observed that in the instant case, the very agents who had planned the meeting between petitioner and Tripp for approximately one week were obviously without sufficient and reliable information with which to obtain a search warrant prior to the date of rendezvous. Thus, these agents had petitioner under surveillance for the sole purpose of obtaining the requisite corroboration of their informant's "tip," and they gleaned absolutely nothing from their assignment, prior to petitioner's arrest. Moreover, and contrary to the factual inferences drawn by the court below, the only testimony tending to establish the known reliability of the subject informant was elicited from Agent Charles Kunkel, who stated that he had on one occasion made an arrest based upon information received from Tripp (R. 99, 102-105), but there is no evidence on this record to indicate that any arrest made on the basis of Tripp's information was known to have resulted in conviction, that the information thus received had been otherwise proven accurate and reliable, or that such witness had ever had occasion to discuss the reliability of such informant with the arresting agent, Copeland, or anyone else.

With regard to the subject informant's inherent inability to recognize the currency as counterfeit, the facts are here strikingly similar to *United States* v. *Peisner* (4 C.A.), 311 F.2d 94, 5 A.L.R.2d 1196, involving the possession by an accused person of obscene literature. The Fourth

Circuit reversed the conviction, holding in effect that inasmuch as there had been no determination regarding the illegal nature or obscene character of the precise books possessed by Peisner prior to his arrest, the arresting officer could not be said to have possessed "probable cause" to support his warrantless arrest and the subsequent search of Peisner's automobile.

II. The court below further held, in affirming the trial court herein, that the recording of the conversation asserted to be that of the informant, Tripp, and petitioner, was admissible under *Lopez* v. *United States*, 373 U.S. 427, ___ S.Ct. ___, although obtained through an electronic listening device concealed upon the person of the informant, and that *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, is inapplicable.

In *Katz, ibid*, this Court takes the view that in order for a recording, such as Government's Exhibit No. 3 in the instant case, to be admissible, a judicial determination of the existence of "probable cause" for the search must be made before the recording is taken, in accordance with the constitutional test thus applied for the issuance of search warrants and in protection of those fundamental rights vouchsafed to every citizen of the United States by the Fourth Amendment.

> "* * * Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed. 2d 734. Once this much is acknowledged, and

> once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> "We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Katz supra*, 88 S.Ct. 507, 512.

As to whether the Government's evidence could there be said to establish the requisite "probable cause" for such search via an electronic listening device, the *Katz* Court stated:

> "Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. * * *" *Katz, supra*, 88 S.Ct. at p. 513.

And see *Osborn* v. *United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394. But *Cf. Berger* v. *United States*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040. Nevertheless, in *Katz* v. *United States, supra*, as here, there was no showing that a judicial determination of "probable cause" for the search had been made prior to the eavesdropping, and the Court accordingly reversed the conviction, stating at page 514:

> "* * * Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent."

III. The court below specifically held that the challenged palm-fingerprint evidence was admissible to show criminal intent on the part of petitioner. This ruling being in conflict with applicable decisions of other circuits, petitioner duly filed a petition for rehearing, attaching as Exhibit "A" thereto, certified copies of an excerpt from the record in Case No. 66-H-192 before the United States District Court for the Southern District of Texas, said record excerpt reflecting the previously adjudicated character of this same evidence as being there inconclusive and incompetent to connect Joseph Daniel Holt, the petitioner herein, to the passing or possession of counterfeit currency, whereupon the dismissal of the charge then on trial was ordered dismissed as against this petitioner.

The decision of the court below regarding the admissibility of this evidence apparently overlooks the fact that the subject palm-fingerprint evidence was not offered by

the respondent-Government as part of its case-in-chief, *i.e.*, as an essential element of the offense charged, but rather was first introduced into evidence on respondent's rebuttal, after the defense had rested its case, for the sole purpose of impeachment.

It is well established that evidence or allegations of prior crimes are inadmissible at a criminal trial either to establish guilt or to show that a defendant would be likely to commit the crime with which he is charged. See: *Michelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168; *O'Dell* v. *United States* (10 C.A.), 251 F.2d 704; *Fitts* v. *United States* (10 C.A.), 284 F.2d 108; and *Maestos* v. *United States* (10 C.A.), 341 F.2d 493. An important exception to this rule is, of course, that where, as here, the accused voluntarily takes the witness stand in his own behalf, his character is put at issue and, for purposes of impeachment, he may then be interrogated concerning prior convictions and, in the event he denies such convictions, rebuttal proof thereof may be presented.

> "Cross-examination of an accused as to collateral matters should properly be limited to an effort to discredit him as a witness, and the limit is exceeded when the questions are not useful for that purpose and the necessary result, and perhaps the purpose, is merely to prejudice the jury against the defendant." *United States* v. *Pennix* (4 C.A.), 313 F.2d 524.

Recognizing conflicts then existent at various levels of the judiciary regarding the cross-examination of a defendant regarding previous convictions, Judge McDermott announced the rule for the Tenth Circuit in *Coulston* v. *United States*, 51 F.2d 178, wherein it is stated:

> "* * * In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, . . . or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible. * * * A witness may not be asked if he has been accused or arrested for a crime, for the sufficient reason that it calls for hearsay evidence, and because accusation carries no implication of guilt. * * *" *Coulston* v. *United States, supra,* p. 182.

In *Banning* v. *United States* (6 C.A.), 130 F.2d 330, 338, the Court observed:

> "Attempts are often made to convict persons of crime by showing they have been arrested on previous occasions * * *. Such evidence, standing alone, is highly prejudicial and its admission universally condemned. We have no intention of modifying this rule of exclusion . . ."

Accordingly in *Manley* v. *United States* (6 C.A.), 238 F.2d 221, 222, the Court held:

> "It is well settled that it is not permissible for the government to show that a defendant has been accused of, arrested for, or indicted for a crime. Only a previous *conviction* for crime is admissible, under appropriate circumstances."

And see: *Lane* v. *Warden, Maryland Penitentiary* (4 C.A.), 320 F.2d 179; *United States* v. *Dressler* (7 C.A.), 112 F.2d 972. And *Cf. Newman* v. *United States* (8 C.A.), 331 F.2d 968, regarding prior convictions pending on appeal. And, a criminal defendant's prior difficulty with the law, specific prior criminal act, or bad reputation cannot be used by the Government to prove guilt of an unconnected crime. See: *Bullard* v. *United States* (5 C.A.), 395 F.2d 658; *United*

States v. *Byrd* (2 C.A.), 352 F.2d 570; and *United States* v. *Birns* (6 C.A.), 395 F.2d 943. See also *Rosario* v. *People of Territory of Guam* (9 C.A.), 391 F.2d 869, reversing a conviction where evidence of another and prior forgery was admitted to show plan, scheme and design.

In *Oddo* v. *United States* (5 C.A.), 396 F.2d 807, the appellant was indicted on three counts for the crime of passing counterfeit money. The trial ended with a verdict of not guilty as to count one, disagreement of the jury as to count two, and acquittal as to count three. He was then re-tried on the second count, and during the course of trial, the Government introduced all of the evidence that had previously been introduced in support of the two counts upon which appellant had been acquitted, to show, as here, criminal intent or plan, scheme and design. Affirming the trial court in conviction, the Fifth Circuit there reasoned:

> "The rule that permits the introduction of evidence relating to similar transactions to show knowledge and intent of a person accused of crime, is not restricted to proof of transactions adequate to establish guilt of a prior or different offense. Under the principle announced by this court as early as Pilcher v. United States (5 CA), 113 F.2d 248, we conclude that the trial court did not err in the admission of this evidence."

Thus, the question in *Oddo*, as here, is not one regarding relevancy of the evidence, but one of estoppel presently pending before this Court on petition for writ of certiorari. And see also *Metheany* v. *United States* (9 C.A.), ____ F.2d ____, 37 U.S. Law Week 3009, presently docketed as Case No. 64 before the United States Supreme Court seeking certiorari on the issue whether the Government is pre-

cluded by principles of collateral estoppel from proving in a perjury trial facts previously determined in the defendant's favor in his trial for concealment of bankruptcy assets.

In the case pertinent to the case at bar, the Fifth Circuit trial court did not make formal written findings of fact and conclusions of law in support of its decision regarding the acquittal of Joseph Daniel Holt. However, it is clear from a reading of the excerpt from the trial proceedings, attached as Exhibit "A" to this petitioner's petition for rehearing in the case before the Court of Appeals, that the Texas trial court's acquittal was based upon the fact that the palm print herein complained of was taken from a sheet of yellow-lined paper; that the sheet of yellow-lined paper did not connect Joseph Daniel Holt to the crime charged; and, that there was no competent evidence introduced to otherwise connect said Josep Daniel Holt to the possession or passing of counterfeit currency.

Recently speaking on the applicability of the doctrines of estoppel in criminal cases, the Eighth Circuit Court observed in *Ferina* v. *United States*, 340 F.2d 837, that to bar the litigation of an issue in the subsequent proceedings, the doctrines of *res judicata* and collateral estoppel in criminal cases require that the same issue must have been determined favorably to the accused, expressly or by necessary implication, in a prior adjudication between the same parties. Relief was there denied as the prior judgment of acquittal sought to be invoked as a bar to the subsequent prosecution in federal court was prosecuted by the state.[1]

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[1] See: *Double Jeopardy and Collateral Estoppel*, by J. I. Pattinson, Criminal Law Bulletin (Warren, Gorham & Lamont), September, 1968, Vol. 4, No. 7, pp. 406-412, and cases there cited.

It is well settled under the doctrine of *res judicata*, that an issue which has been litigated and determined in favor of the defendant in a court of competent jurisdiction between the same parties may not be again litigated by them in another criminal proceedings. See *United States* v. *Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161. The doctrine applies to criminal proceedings as well as civil proceedings, and operates to conclude those matters in issue which the judgment determined though the offenses be different. See: *Sealfon* v. *United States*, 332 U.S. 575, 68 S.Ct. 237; *United States* v. *De Angelo* (3 C.A.), 138 F.2d 466; and *United States* v. *Adams*, 281 U.S. 202, 50 S.Ct. 269, 74 L.Ed. 807.

The primary issue before the Texas trial court was whether the palm print of Joseph Daniel Holt, shown to have been taken from a sheet of yellow-lined paper, could be said to connect said accused to the possession or passing of counterfeit currency as there charged. That trial court, having heard all the evidence, by its verdict of acquittal necessarily found the palm print to be wholly incompetent to connect said Joseph Daniel Holt to the possession or passing of counterfeit currency, and that issue was thereby finally adjudicated in favor of said Joseph Daniel Holt, the petitioner herein. It necessarily follows, contrary to the decision of the court below, that such palm-fingerprint evidence having been so adjudicated as incompetent and inconclusive to connect petitioner with the crime there charged by a court of competent jurisdiction within the Fifth Circuit, said palm-fingerprint evidence remains incompetent and inconclusive to show a prior posession or passing of counterfeit currency by said Joseph Daniel Holt, the petitioner herein, within the Tenth Circuit.

Petitioner contends that the error of the trial court in admitting the challenged palm-fingerprint evidence into evidence was highly prejudicial; that the decision of the court below in affirming the trial court, if permitted to stand, will reflect disregard for principles heretofore established by this Court; and, that if the decision of the court below be permitted to stand, it will further constitute a conflict of decisional law between the circuits, such as would call for review of each of the rulings below.

Respectfully submitted,

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Leonhardt Building
Oklahoma City, Oklahoma

Attorney for the Petitioner

of Counsel:

JO-ANN FISHER CORRIGAN
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Oklahoma City, Oklahoma

and

H. A. LEATHERMAN
839 N.E. 23rd Street
Oklahoma City, Oklahoma

December, 1968

APPENDIX A

FILED
DEC 1 1967
Vera L. Howard
Clerk, U. S. District Court
By /s/ Josephine P. Gore
Deputy

Judgment and Commitment (Rev. 7-52) Cr. Form No. 25

United States District Court

FOR THE

WESTERN DISTRICT OF OKLAHOMA

United States of America

v.

Joseph Daniel Holt

No. 67-212 Criminal

On this 1st day of December , 1967 came the attorney for the government and the defendant appeared in person and[1] by H. A. Leatherman, Esq., his attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] NOT GUILTY and a Verdict of Guilty of the offense of violation of Title 18, U.S.C., Section 472 (Concealing and possessing falsely made, forged and counterfeited United States securities) as charged in the one Count of the Indictment)

~~as charged~~

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of[4] twelve (12) years on the one Count of the Indictment, or until defendant is otherwise discharged as provided by law.

IT IS ORDERED that the defendant pay a fine unto the United States in the sum of Five Thousand Dollars ($5,000.00) and in default thereof stand committed until said fine is paid, or until released by due process of law.

IT IS ADJUDGED that[5] the defendant's appeal bond is hereby set in the amount of Twenty Thousand Dollars ($20,000.00)

IT IS ORDERED that the defendant is granted leave to remain on present bond until December 4, 1967 at 5 p.m. to post appeal bond.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

~~The Court recommends commitment to~~[6]

/s/ Luther B. Eubanks
Luther B. Eubanks *United States District Judge.*

Vera L. Howard, Clerk
By /s/ Josephine P. Gore
Deputy *Clerk.*

[1]Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
SEP 16 1968
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY, 1968, TERM

JOSEPH DANIEL HOLT,	)	
	)	
Appellant,	)	
	)	
vs.	)	Number 9859
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(District Court No. 67-Cr-212)

H. A. Leatherman, Oklahoma City, Oklahoma, for Appellant.

John E. Green, Assistant United States Attorney (B. Andrew Potter, United States Attorney, was with him on the brief), for Appellee.

Before MURRAH, Chief Judge, and HILL and SETH, Circuit Judges.

HILL, Circuit Judge.

Appellant was tried to a jury and convicted of the unlawful possession of counterfeit money in violation of

[APPENDIX]

18 U.S.C. § 472. Judgment was entered upon the jury verdict and sentence was pronounced from which this appeal was taken.

The three points made here all go to the admission of evidence during the course of the trial. Appellant contends: (1) that certain evidence obtained from his person at the time of his arrest was obtained through an illegal search and seizure and should have been excluded; (2) that a tape recording of a conversation had with an informant shortly before this arrest was obtained pursuant to an unreasonable search and seizure and should likewise have been excluded; and (3) that certain palm-fingerprint evidence should not have been admitted because it was obtained from a previous trial of appellant on a different counterfeiting charge and one in which the court had directed a verdict of "not guilty" in favor of appellant.

Appellant was arrested without a warrant on June 14, 1967, at the Will Rogers World Airport, Oklahoma City, Oklahoma by Special Agent Copeland of the United States Secret Service for possession of counterfeit money. Upon searching the appellant, Agent Copeland uncovered a package containing 150 counterfeit $100.00 Federal Reserve Notes. It is the admission of these notes into evidence that appellant asserts as one of the errors on appeal.

The circumstances surrounding the arrest are that an informant had arranged to purchase counterfeit money at a meeting to be had with the appellant at the airport in Oklahoma City. The informant having been in contact with the Secret Service, a team of such agents began their surveillance of appellant approximately one week before the contemplated meeting. On the morning of the arrest the informant met with agents in Dallas, Texas, where a miniature electronic recording device was concealed on his person. The informant was also searched at that time and no counterfeit currency was found. Shortly thereafter, in the company of Agent Edward Moore, the informant boarded an airplane for the flight to Oklahoma.

Contemporaneously with the activity in Dallas, the agents conducting the surveillance of the appellant in Oklahoma, convened at the airport. Upon the arrival and deboarding of the informant and Agent Moore, each agent was stationed at a strategic location within the terminal building of the airport. The informant went into the airport coffee shop where he was observed in conversation with the appellant. This conversation was overheard in part by other agents listening over a receiver that had been set up to receive the transmissions of the recording device carried by the informant. The two men then separated, whereupon the informant stated to one Agent McWerthy that "he's in the phone booth and he's got it on him." This information was relayed to other agents who in turn relayed this fact to Agent Copeland who made the arrest and search at issue here.

During the trial the Government presented the testimony of the various Secret Service Agents involved. The cumulative effect of this testimony was to establish the facts as set forth above. After the Government rested its case, appellant testifying in his own behalf, related the facts of various previous criminal convictions involving assorted illegal acts. Appellant also testified that the informant had given him the money to finance the purchase of used automobiles and that he was unaware that the money was counterfeit. On rebuttal the informant related his role in the case and flatly denied having given the money to appellant. It was at this time that the tape recording of the airport conversation between the informant and appellant was played in open court to the jury. It is admitted that this recording was largely unintelligible and inaudible. Appellant assigns as his second basis of appeal, the admission of this recording into evidence.

The Government then proceeded to introduce palmfingerprint evidence that had been withdrawn from a criminal trial in a Texas court involving the appellant in a similar counterfeiting charge. Because that trial had previously

resulted in a directed verdict in favor of the appellant, he assigns as his third and final ground for appeal, the admission of that evidence.

The search of appellant and the seizure of the counterfeit money were undertaken without the authority of a search warrant and therefore the counterfeit money was admissible into evidence only if it was seized as the result of a search incidental to a lawful arrest.[1]

The Secret Service is empowered to effectuate a lawful arrest without a warrant only if there is "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony. 18 U.S.C. § 3056. "Reasonable grounds" as used in that statute and "probable cause" as used in the Fourth Amendment are substantially equivalent.[2] Thus, the ultimate question determining the propriety of the evidentiary allowance is one of probable cause.

This court has "grudgingly sanctioned interception and apprehension of a moving vehicle or person and the search of such vehicle or person for contraband if the enforcement officer has probable cause to believe that the law is being violated in his presence and it is then impractical to secure a warrant."[3] Because counterfeit currency is contraband, the mere possession of which is unlawful, the appellant was committing a continuing felony as long as he possessed the counterfeit money. Hence, if the arresting agent had

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[1] Taylor v. United States, 334 F.2d 386, 388 (10th Cir. 1964) and citations therein.

[2] Both parties agree that the analogy furnished by Draper v. United States, 358 U.S. 307 (1959), wherein "reasonable grounds" as defined in the Narcotics Control Act was equated with the "probable cause" of the Fourth Amendment, is clearly controlling.

[3] United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21, 23 (1959). See also, Anderson v. United States, ... F.2d ..... (10th Cir. 1968).

probable cause to believe such felony was being perpetrated, the arrest was proper. The Government, seeking to establish probable cause, relies upon the reliability of the informant as established by his previous dealings with the Secret Service; the corroborative effect of the appellant's appearance at the airport; and the fact of the observance by the arresting officer of a bulge in the appellant's clothing which revealed a brown paper bag wrapped around "something white" exposed through a torn corner of the bag. Appellant contends that the admitted inability of the officer to recognize the contents of the paper bag as counterfeit currency until after a detailed examination had been conducted, reflects a lack of corroboration of the informant's statement, thereby negating the existence of probable cause.

It was established in Draper v. United States, 358 U.S. 307 (1959), that to constitute probable cause for an arrest it must be shown at the time the officer makes the arrest that the facts and circumstances within his knowledge and of which he has reasonably trustworthy information, are sufficient to warrant a prudent man in believing that an offense has been or is being committed. "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."[4] In order to further this policy of accommodating competing policies, courts have allowed statements by a credible informant to constitute the nucleus of the requisite probable cause. In Jones v. United States, 362 U.S. 257, 269 (1960), the court, citing Draper, stated: "[W]e have held that [the arresting officer] may rely upon

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[4] Beck v. Ohio, 379 U.S. 89, 91 (1964), *citing* Brinegar v. United States, 338 U.S. 176 (1949). See, Sibron v. New York, 392 U.S. 40 (1968).

information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." In Draper, the "other matters within the officer's knowledge" were that a reliable informant had indicated that the defendant, who was adequately described, would arrive at a particular place, at a specific time, and would be carrying narcotics. Upon the officer's observation of a man meeting the description given by the informant, the valid arrest was consummated. Similarly, in McCray v. Illinois, 386 U.S. 300 (1967) the statement of a known informant that the defendant would be at a specific place at a given time was held sufficient probable cause to sustain the subsequent arrest.

In the case at bar the Secret Service agents testified that the informant had provided reliable "tips" in the past. It was also shown that he correctly stated that the appellant would be in the airport at the particular time in question. Consequently, here as in Draper, a reliable informant has indicated that the appellant, who was adequately described, would arrive at a particular place at a specific time, and would be carrying contraband. But here there was even more. Once having conversed with the appellant and being satisfied that he possessed contraband, the informant notified an agent who relayed the information to the arresting officer who in observing the appellant noticed a torn brown sack bulging from the latter's pocket. It is well settled that an agent may rely upon his fellow officer's to supply the information which forms the basis of the arresting officer's reasonable grounds for believing that the law is being violated. Hence, the fact that the informant's reliability and his statement that appellant was carrying the currency were provided through the statements of the arresting officer's colleagues, is not determinative. Nor is the inability to identify the currency as counterfeit prior to the arrest sufficient to invalidate it. It is not necessary that the officer possess knowledge of facts sufficient to

establish guilt, all that is required is knowledge that would furnish a prudent man with reasonable grounds for believing a violation had occurred.[5] This being so, the search and seizure was valid as an incident to a lawful arrest and the evidence seized was clearly admissible.[6]

Appellant next contends that it was reversible error to allow the tape recording of his conversation with the informant to be played in open court to the jury. This assertion is based upon the recent case of Katz v. United States, 389 U.S. 347 (1968), which held it to be an unreasonable search and seizure for federal agents, using an electronic eavesdropping device, to listen and record the defendant's end of a telephone convrsation made from a public phone booth.[7] Appellee counters by urging a distinction between the facts of Katz and those presented here.

We agree that Katz is not controlling under the circumstances in this case. Here the informant testified as to the "bugged" conversation with the appellant. The tape recording was then admitted into evidence to corroborate this testimony. It is conceded by appellant, as indeed it must be, that the testimony of the informant was clearly admissible. See Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966). Thus, in the words of Mr. Justice White, concurring in Katz: "When

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[5] The assertion that absent knowledge that was sufficient to prove the currency as counterfeit, there could not be probable cause reflects confusion between the requisites for showing guilt and the requirements for probable cause. "There is a large difference between the two things to be proved . . . and therefore a like difference in quanta and modes of proof required to establish them." Draper v. United States, supra at 312.

[6] McCray v. Illinois, supra; Wong Sun v. United States, 371 U.S. 471 (1963); Draper v. United States, supra; and Taylor v. United States, supra.

[7] With regard to the general problem of electronic surveillance see *Standards Relating to Electronic Surveillance*, ABA Advisory Committee (Tent. Draft 1968).

one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he heard." From this basic premise, White, J., concluded that: "It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."

The distinction, then, between this case and Katz, is that in the latter the eavesdropping occurred when Government agents listened in on the defendant and another unsuspecting third party. Here the eavesdropping was merely the corroboration of a conversation between the appellant and a Government informant. The eavesdropping thus stands in the stead of the informant and is admissible on the same basis as is the testimony of the informant. This proposition was made clear in Katz when White, J., referred to Lopez v. United States, 373 U.S. 427 (1963) as remaining undisturbed by the decision in Katz. In Lopez a concealed instrument on the person of a Government agent recorded a conversation between him and the defendant. Admission into evidence of the recording to corroborate the testimony of the agent was upheld.

In Dancy v. United States, 390 F.2nd 370 (5th Cir. 1968), the issue concerned the testimony of a Government agent regarding a conversation had between an informant and the defendant and overheard by the Government agent. The informant, having been outfitted with an electronic transmitter, entered the defendant's apartment, purchased narcotics and returned to the nearby station of the eavesdropping Government agent. The court held that the testimony was admissible because the case was not controlled by Katz but rather by Lopez and Long v. United States, 387 F.2d 377 (5th Cir. 1967). The reasoning in Dancy applies here inasmuch as the factual setting of that case and the case at bar are clearly indistinguishable. We conclude

that the present case deals with an entirely different situation than existed in Katz. It remains the law that the recording of a conversation between an informant and a suspect, obtained through an electronic device concealed upon the person of the informant under circumstances such as exist in this case, is admissible into evidence. See Lopez v. United States, supra; On Lee v. United States, 343 U.S. 747 (1952); Dancy v. United States, supra; and Long v. United States, supra.

Appellant's final contention relates to the admission of the palm-fingerprint evidence. This evidence had been obtained from the record of a previous criminal trial in a Texas court which had resulted in a directed verdict in favor of the appellant.

It is well settled that, in a counterfeiting case, evidence of passing or attempting to pass similar counterfeit notes on other occasions is admissible on the question of the defendant's criminal intent which is indispensable to proof of the offense. United States v. Leitner, 312 F.2d 107 (2nd Cir. 1963); Marson v. United States, 203 F.2d 904 (6th Cir. 1953); Carrulo v. United States, 184 F.2d 743 (8th Cir. 1950); and York v. United States, 241 F. 656 (9th Cir. 1916). In addition, this court has often ruled that such evidence of other acts is admissible if so related to the crime charged as to indicate motive or intent. Rothering v. United States, 384 F.2d 385 (10th Cir. 1967); Morgan v. United States, 355 F.2d 43 (10th Cir. 1966); and Tandberg-Hanssen v. United States, 284 F.2d 331 (10th Cir. 1960). Appellant, however, would distinguish the present situation because the evidence of the passing of similar counterfeit notes was introduced into a previous trial; and it was there found to be inconclusive as is indicated by the directed verdict therein. But evidence of similar acts is admitted merely for the purpose of establishing intent as to the charge then under consideration; it is not admitted to establish or disestablish the existence of a criminal violation based solely

upon the previous act. Thus, whether the previous similar act was criminal in character or not;[8] or if criminal, whether there were separate criminal charges based thereon or not, and regardless of the outcome of those charges, the evidence is admitted to allow the jury to consider it in an effort to ascertain the existence of intent as an element of the present crime charged. The directing of a verdict is a negative sort of conclusion lodged in a finding of failure of the prosecution to sustain the burden of proof beyond a reasonable doubt. It does not preclude using evidence to assist in demonstrating intent as to a subsequent independent act. It is conceded by appellant that the jury was correctly instructed as to the proper consideration to be given to the palm-fingerprint evidence; hence, there was no error in its admission and appellant's final contention on appeal must fail.

AFFIRMED.

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[8] United States v. Chase, 372 F.2d 453 (4th Cir. 1967); Kowalchuk v. United States, 176 F.2d 873 (6th Cir. 1949); Benchwick v. United [illegible] F.2d 330 (9th Cir. 1961).

APPENDIX C

NOVEMBER TERM, NOVEMBER 20th, 1968.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

Joseph Daniel Holt,	)	
	)	
Appellant,	)	Appeal from the United
	)	States District Court
9859 vs.	)	for the Western District
	)	of Oklahoma.
United States of America,	)	
	)	
Appellee.	)	

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

A true copy

Teste

William L. Whittaker
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

/s/ Annie M. Cabot
Deputy Clerk

(S E A L)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 885

JOSEPH DANIEL HOLT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on September 16, 1968. A petition for rehearing was denied on November 20, 1968. The petition for a writ of certiorari, filed on December 20, 1968, is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the questions sought to be raised do not warrant further review.

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of unlawful possession of counterfeit

money, in violation of 18 U.S.C. 472. On December 1, 1967, he was sentenced to imprisonment for a period of twelve years and a fine of $5,000 (Pet. App. A). The court of appeals affirmed (Pet. App. B).

At the request of Secret Service agents, Harry Tripp, an informant who had worked with the Secret Service in two other cases in which he had given reliable information (R. 254, 79, 168-169, 190-192), made a telephone call to petitioner in Oklahoma City. In this conversation, Tripp told petitioner that he needed fifteen cars, which he testified meant $15,000, in counterfeit bills (R. 237-240). On June 14, a Secret Service agent accompanied Tripp as he traveled by plane from Dallas to Oklahoma City. Prior to the flight, the agent searched Tripp to ascertain that he had no counterfeit money in his possession and taped a small radio transmitter on his person. (R. 226, 228, 234). Other agents, alerted by the information received from Tripp, observed Tripp arrive at the airport in Oklahoma City, meet and converse with petitioner, after which petitioner went to a telephone booth (R. 74-78, 135-136, 163, 193-197, 234, 264-268, 270-271). Tripp used his radio device to inform the agents that petitioner was now in a telephone booth and had the counterfeit money on him (R. 170-171, 188-189, 229). When petitioner emerged, one of the agents approached him, saw that he had a package protruding from his left pocket and placed him under arrest (R. 140-142, 158). The package was found to contain 150 counterfeit $100 Federal Reserve notes (R. 137, 144, 201).

Petitioner testified that, among other activities, he was a dealer in used cars. The purpose of his meeting with Tripp was to receive some money to buy cars for Tripp. He was not wearing a coat that day and, upon receiving the package containing the money, stuck it in his left shirt pocket. He did not know that the money inside the package was counterfeit (R. 210-217).

1. The court properly denied motions both before and during trial to suppress the counterfeit bills seized at the time of petitioner's arrest. At the time of the arrest the agents had probable cause to believe that a felony was being committed, based on the knowledge received from a reliable informant, which was corroborated by petitioner's appearance at the time and placed expected, with a package bulging from his pocket, and by the further positive assertion of the informant that the money was on petitioner. *Draper* v. *United States*, 358 U.S. 307; *McCray* v. *Illinois*, 386 U.S. 300. The collective knowledge of the agents could properly be considered in ascertaining the existence of probable cause to arrest. *United States* v. *Ventresca*, 380 U.S. 102, 110; *United States* v. *Pitt*, 382 F. 2d 322 (C.A. 4).

2. No Fourth Amendment rights are violated by permitting the testimony of a government agent or informant as to a non-privileged conversation with an accused. *Hoffa* v. *United States*, 385 U.S. 293, 300-303; *Lewis* v. *United States*, 385 U.S. 206. Corroboration of such conversations by electronic means is likewise proper. *Lopez* v. *United States*, 373 U.S. 427; cf. *Rathbun* v. *United States*, 355 U.S. 107. In

Katz v. *United States*, 389 U.S. 347, 351, the Court recognized that if a person knowingly exposes his criminal activities by a voluntary conversation with another party, even in his own home or office, the Fourth Amendment affords him no protection against revelation by that party of the conversation. It is only if the "uninvited ear" intrudes into the conversation that a search and seizure, within the meaning of the Fourth Amendment, is found. Thus *Katz* does not constitute a repudiation of the *Lopez-Rathbun* authority. *Walker* v. *United States*, 397 F. 2d 789 (C.A. 5), pending on petition for certiorari, No. 929 Misc., O.T. 1968; *Handsford* v. *United States*, 390 F. 2d 373 (C.A. 5), certiorari denied, 391 U.S. 915; cf. *Leighton* v. *United States*, 386 F. 2d 822 (C.A. 2), certiorari denied, 390 U.S. 1025.[1] Moreover, in the present case the introduction of the tape had little, if any, significance. The judge's comment after hearing the tape was that he could not understand a word and did not feel that it helped a bit (R. 263-264, 309).

3. Petitioner, testifying in his own behalf, admitted having the bills in his possession on the occasion in question but denied knowledge that they were counterfeit and said that he accepted them without examination from Tripp, who wanted him to buy some used cars (*supra*, p. 3). To rebut this testimony and to prove guilty knowledge and intent, a Secret Service agent testified that, on May 23, 1966, he had received

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[1] Only the Seventh Circuit has taken the view that *Katz* overruled *Lopez* in a situation where the informer did not testify. *United States* v. *White*, decided en banc January 7, 1969. Here, however, the informant did testify.

a yellow-lined sheet of paper, which was folded over two counterfeit twenty-dollar bills from the operator of an automotive shop in Houston, Texas (R. 282-283). Latent prints on the yellow sheet were found to correspond with petitioner's fingerprints (R. 294). Petitioner established that the bills and yellow sheet were an exhibit in a federal court case in Houston in which petitioner had been acquitted upon direction of the court (R. 301, 307). The court gave a contemporaneous instruction that these items were admitted only to show knowledge, intent, motive or design as to the offense here charged and that petitioner could not be convicted on evidence tending to show the commission of another offense (R. 308). A similar instruction was given in the charge, with the further caution that evidence of an alleged earlier act must be clear and conclusive (R. 342-343).

Petitioner attacks the admission of this evidence on the ground that he was acquitted in the Texas case. The rule which permits introduction of evidence relating to similar transactions to show knowledge and intent of an accused is not restricted to proof of transactions adequate to establish guilt of a prior offense. *Hernandez* v. *United States*, 370 F. 2d 171, 174 (C.A. 9); *Oddo* v. *United States*, 396 F. 2d 806 (C.A. 5), certiorari denied, October 14, 1968, No. 302 O.T. 1968. The theory upon which such evidence is admitted is that repetition of instances similar in nature to the acts charged tends to negative the element of accident or inadvertence, even when the evidence tending to connect an accused with such events is tenuous. 2 Wigmore, *Evidence* (3 Ed.), §§ 302, 303, 313. This

line of reasoning is especially apt to the offense here charged. Possession of counterfeit money on a single occasion may well be the result of chance, but when the occasion is repeated, the element of chance tends to disappear. See Wigmore, op. cit. § 317, p. 218, n. 4. Contrary to petitioner's contention, evidence relating to intent is especially appropriate on rebuttal after the defendant has testified and denied guilty knowledge and intent. *Carrullo* v. *United States*, 184 F. 2d 743 (C.A. 8). The scope of such evidence is subject to the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60, 81; *Sutton* v. *United States*, 391 F. 2d 592 (C.A. 5); *Love* v. *United States*, 386 F. 2d 260 (C.A. 8), certiorari denied, 390 U.S. 985.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1969

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 885

JOSEPH DANIEL HOLT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

On February 24, 1969, this Court entered its order denying certiorari in the above-captioned criminal proceedings. The Petitioner above-named respectfully petitions this Honorable Court for a rehearing of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in the above matter, and in support of his petition represents to the Court as follows:

We reserve our argued position as to each of the points initially raised, but address ourselves solely to that feature of this Court's decision wherein we believe the Court may now be convinced that the result of its decision in denying certiorari in the case at bar, when viewed in the light of its most recent decision in *Spinelli* v. *United States,* — U.S. —, 37 Law Week 4110, announced January 27, 1969 and after the instant case had been submitted, constitutes an incongruity in the decisional law of "probable cause."

In *Spinelli* v. *United States, supra,* the accused challenged the constitutionality of the warrant which authorized the F.B.I. search that subsequently uncovered evidence necessary to the conviction. Justice Harlan premised the granting of certiorari upon a belief that the principles of *Aguilar* v. *Texas,* 378 U.S. 108, should be further explicated The Court observed:

> "In *Aguilar,* a search warrant had issued upon an affidavit of police officers who swore only that they had 'received reliable information from a credible person and do believe' that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable.' " 37 Law Week, 4110, 4111.

This Court's decision in *Spinelli* is clearly retroactive, and applicable to the case at bar. It is now manifestly clear that in order to establish requisite "probable cause" sufficient to form the basis for either a warrantless arrest, as in the case at bar, or for the issuance of a search warrant, as in *Spinelli,* the previously proven reliability of an informant, such as Tripp, must first be shown by positive, clear and convincing evidence. Secondly, regardless of the proven reliability of such informant or the quality of information shown to have been previously obtained from this

source, the officers seeking either the issuance of a warrant, or to preserve evidentiary fruits seized and obtained incident to a warrantless arrest and search, are required to show and establish by competent evidence within their personal knowledge, corroborative facts or evidence which, standing alone and unaided by the so-called "tip" received from such reliable informant, clearly reflect criminal conduct on the part of the accused. And, in determining the adequacy of such corroborative evidence obtained, the officers are forewarned that their observations of the accused must be independent of the informant's tip and clearly constitute criminal conduct—not merely suspicious acts on the part of their suspect. In this regard, Justice Harlan observes that the conduct or acts by the accused are not endowed with an aura of suspicion by virtue of the informant's tip.

Relying on *Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329, the court below seemed to conclude in the instant case that although neither the informant nor the reliable character of his information were known to Agent Copeland at the time of petitioner's arrest herein, testimony of other agents elicited by the respondent-Government during trial herein, regarding their dealings with the informant, Tripp, could somehow be imputed to the knowledge of the arresting agent, thus constituting the "tip" received as information from a reliable source, which when coupled with the fact of petitioner's presence at the airport, arose to the dignity of "probable cause." Here, however, the informant admittedly caused petitioner to be present at the airport on an appointed date and time, and at the specific direction of the Secret Service Agents, who

simultaneously had petitioner under surveillance. But, the factual difference becomes clear when it is observed that in the instant case, the very agents who had planned the meeting between petitioner and Tripp for approximately one week were obviously without sufficient and reliable information with which to obtain a search warrant prior to the date of rendezvous. Thus, these agents had petitioner under surveillance for the sole purpose of obtaining the requisite corroboration of their informant's "tip," and they gleaned absolutely nothing from their assignment, prior to petitioner's arrest. Moreover, and contrary to the factual inferences drawn by the court below, the only testimony tending to establish the known reliability of the subject informant was elicited from Agent Charles Kunkel, who stated that he had on one occasion made an arrest based upon information received from Tripp (R. 99, 102-105), but there is no evidence on this record to indicate that any arrest made on the basis of Tripp's information was known to have resulted in conviction, that the information thus received had been otherwise proven accurate and reliable, or that such witness had ever had occasion to discuss the reliability of such informant with the arresting agent, Copeland, or anyone else.

It is thus submitted that the decisional law resulting from this Court's denial of certiorari in the case at bar, when compared with the decisional law subsequently announced in *Spinelli* v. *United States, supra*, constitutes an incongruity in the law of "probable cause," and for this reason, the Petition for Rehearing should be granted.

Respectfully submitted,

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March, 1969

CERTIFICATE OF COUNSEL

I, Herbert K. Hyde, Counsel of Petitioner, hereby certify that I am one of the attorneys for the Petitioner in this cause; that I make this certificate in compliance with the Rules of this Court; and, that in my judgment, the within and foregoing Petition for Rehearing is well founded, filed in good faith, and is not interposed for delay.

HERBERT K. HYDE
Counsel for Petitioner